



Legal Update

December 31, 2014

The SJC concludes that the G. L. c. 265§ 43A is constitutional on its face and as applied to the defendants' acts of cyberharassment.

Commonwealth v William P. Johnson, SJC No. 11660, (2014)

Background: The defendants, William and Gail Johnson, (hereinafter referred to as “the defendants”) were convicted of criminal harassment after having a dispute with their neighbors James Lyons Jr. (hereinafter referred to as “Jim Lyons”) and Bernadette Lyons (hereinafter referred to as “Bernadette Lyons”). The defendants encouraged a third man, Gerald Colton, (hereinafter referred to as “Colton”) to play a series of pranks on Jim and Bernadette Lyons. There were four (4) separate incidents that had occurred. The first incident involved an advertisement that Colton had posted on Craigslist indicating that the Lyons were giving away free golf carts at their home. The Lyons did not own any golf carts and they were alarmed when they found about 30-40 people at their home looking for golf carts. The Lyons reported the incident to police and requested that Craigslist remove the posting. Subsequently, Colton reposted the advertisement and followed up by posting that Jim Lyons was selling his late son’s motorcycle. The posting instructed individuals to call after 10 PM. As a result of this posting, the Lyons received nonstop phone calls regarding the motorcycle for months. The Lyons contacted police. The third incident that occurred involved an email that contained personal identifying information about the Lyons and stated “Its just a game to me.” Afterwards, the defendants encouraged Colton to make a false report that Jim Lyons was abusing his own son and a fictitious boy named Brian.

The defendants and Colton were eventually charged. Colton pled to the charges and testified against both defendants. The Johnsons were convicted and appealed arguing that the G. L. c. 265§ 43A (a) is unconstitutional on its face and challenged various aspects of the statute.

Conclusion: The SJC held that the criminal harassment statute, G.L. c. 265§ 43A (a), was constitutional on its face and was constitutional when considering the application of the defendants' actions of cyberharassment.

1st Issue: Is G.L. c. 265 § 43A (a) unconstitutional on its face because it vague and overbroad?

Pursuant to G.L. c. 265 § 43A (a) a person can be charged with cyberharassment if the Commonwealth proves the following:

- "(1) the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions;
- (2) the defendant intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion;
- (3) the conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim;
- (4) the conduct or speech, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and
- (5) the defendant committed the conduct or speech, or series of acts, 'willfully and maliciously'" *Commonwealth v. McDonald*, 462 Mass. 236, 240 (2012).

The defendant argues that the above statute, G.L. c. 265 § 43A (a) is unconstitutional because it is overbroad and vague. Additionally the defendants contend that G.L. c. 265 § 43A (a) fails to provide notice of what qualifies as cyberharassment. The SJC disagreed and concluded that G.L. c. 265 § 43A (a) is valid under the 1st Amendment and it is not vague because it provides adequate notice of what qualifies as criminal harassment.

2nd Issue: Did the defendants' conduct towards the Lyons family violate G. L. c. 265 § 43A (a) or was the statute unconstitutional as applied to the defendants because it violated the defendants' protected speech rights?

The SJC concluded that the defendants' conduct which included speech that was not protected by the First Amendment, because it was integral to criminal conduct; and, therefore G.L. c. 265 § 43A (a) was not unconstitutional as applied to the defendants.

The SJC first examined "whether pattern of harassing conduct that included both communications made directly to the Lyons family and false communications made to third parties through Internet postings solely for the purpose of encouraging those parties also to engage in harassing conduct toward the Lyons family were considered violations of G.L. c. 265 § 43A (a)." The SJC concluded that the defendants' directive for a third party, Colton, to create fictitious Internet postings and send a letter falsely accusing someone of a crime clearly constitute a crime. As the SJC emphasized, the defendants' actions were intended to solely harass the Lyons family by luring numerous strangers and prompting incessant late-night telephone calls to their home by way of

false representations, by overtly and aggressively threatening to misuse their personal identifying information, and by falsely accusing Jim Lyons of a serious crime.

The SJC also considered whether the defendants' pattern of conduct which included speech was protected by the First Amendment or whether it was integral to the commission of the crime. "Where the sole purpose of the defendants' speech was to further their endeavor to intentionally harass the Lyons, such speech is not protected by the First Amendment. The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). Here, the defendants' conduct which included a hybrid of communications and conduct proved to be integral to the commission of the crime and therefore was not protected under the 1st Amendment. The communications through the Internet postings led to an alarming impact on the Lyons family. The content of the postings bombarded the Lyons family with a number of frightening, frequent and harassing contacts from strangers. Based on these factors, G.L. c. 265 § 43A (a) certainly withstands constitutional scrutiny as applied to the defendants and the defendants' 1st Amendment rights.

3rd Issue: Was there sufficient evidence to find the defendants guilty of joint venture to criminally harass the Lyons family?

The SJC examined two separate prongs G.L. c. 265, § 43A (a) and determined that there was sufficient evidence to find the defendants guilty of criminally harassing the Lyons family.

The first prong the SJC examined was whether the defendants' conduct satisfied the "**directed at**" element of G.L. c. 265, § 43A (a). According to § 43A (a), the Commonwealth must prove that the defendants engaged in three or more acts of harassment that were "directed at a specific person." See *McDonald*, 462 Mass. at 240. The defendants argue that the Craigslist postings (two of the four acts supporting the harassment charge) were not "directed at" the Lyons family, but were directed at the general public. The SJC found that even though the defendants' methods were indirect, the false information in the Craigslist postings was intended solely to ensure that the Lyons family was harassed as a consequence by unwitting third parties contacting them at all hours of the night by telephone and showing up at their home. Essentially, the "sole immediate object" of the false advertisements was to create a marketplace for the guaranteed harassment of the victims. See *United States v. Giboney*, 336 U.S. at 498.

The defendants also argue that the statements made to a third party are not speech directed at a specific person and fall outside the prong. The defendants' acts in the instant case are appreciably different than those at issue in *Welch*. *Commonwealth v. Welch*, 444 Mass. at 92-93 (shouting abusive epithets in one's apartment and speaking in normal tone of voice to third party outside does not satisfy requirements of § 43A [a]). The Craigslist postings were the equivalent of the defendants recruiting others to harass the victims and the victims alone. The causation link is satisfied. The defendants cannot launder their harassment of the Lyons family through the Internet to escape liability.

The second prong the SJC analyzed involved the "seriously alarms" aspect of G.L. c. 265, § 43A (a). The SJC established that this prong does not require that each of the separate acts of harassment cause "serious alarm" but that the Commonwealth must show the **overall pattern of conduct** alarmed the victim and that this alleged harassment was the source of the alarm. The serious alarm required under G.L. c. 265, § 43A (a) must be proven by the testimony of the victim. *Commonwealth v. Braica*, 68 Mass. App. Ct. 244, 247 (2007). The defendants argue that there was insufficient proof that the Lyons family was seriously alarmed or experienced

serious alarm separately for each act, as required. At trial the Lyons family testified about their actual feelings of fear and anxiety. Jim Lyons testified that he felt "bombarded," "attacked," and "very frightened" throughout the ordeal and he described the thirty-five-day "odyssey" in which the defendants would "torture them," stating that he was concerned about the safety of his family and himself: "They attacked my business. They attacked my family. And they tried to take my kids away from me." The Lyons family was sufficiently alarmed to call the police "right away" after the very first harassing act. The police corroborated Jim Lyons' testimony that the defendants' conduct took a substantial emotional toll on him. Clearly the testimony, underscores an abundance of distressing and alarming conduct that amounted to a serious invasion of their emotional tranquility.

Commentary: This case discusses the constitutionality of the criminal harassment statute G.L. c. 265, § 43A (a) and how it applies to patterns of harassing conduct. It is clear from the holding in this case that a person can be charged with violating this statute even if the pattern of conduct was communicated by a third or via the Internet.